

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

January 24, 2006 Session

CRAIG ROBERT NUNN v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 98-C-1622 Seth Norman, Judge

No. M2005-01404-CCA-R3-PC - Filed March 17, 2006

The Petitioner, Craig Robert Nunn, pled guilty to four counts of aggravated sexual battery with a victim less than thirteen years of age, and, in accordance with a plea agreement, the Petitioner was sentenced to twelve years for each conviction, to run concurrently. Subsequently, the Petitioner filed a petition for post-conviction relief, which the trial court dismissed as time barred. On appeal, the Petitioner contends that the trial court erred when it dismissed his petition for post-conviction relief finding that it was time-barred by the statute of limitations. We agree that the Petitioner filed his petition after the statute of limitations had run; however, because the Petitioner may have been deprived by his counsel of a reasonable opportunity to seek post-conviction relief, due process considerations may have tolled the limitations period. Because the record needs further development for this Court to decide this issue, we remand the case to the trial court for a further evidentiary hearing to determine the circumstances surrounding the Petitioner's untimely filing of his post-conviction petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court
Reversed and Remanded

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL JJ., joined.

James A.H. Bell, Knoxville, Tennessee, for the appellant, Craig Robert Nunn.

Paul G. Summers, Attorney General and Reporter; C. Daniel Lins, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Katrin Novak Miller, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts

During a period of approximately four months, the Petitioner engaged in unlawful sexual contact with four separate female victims ranging in age between ten and twelve years old. The Petitioner pled guilty to these offenses on January 14, 1999, and he signed a plea agreement that retired other counts against him. On April 13, 2005, the Petitioner filed a petition for post-conviction relief, in which he alleged that he received the ineffective assistance of counsel, and the trial court summarily dismissed this petition finding that it was time barred by the statute of limitations.

Paragraph (22) of the plea agreement includes a provision that states:

22. I know that the Court will not ordinarily accept a plea of "GUILTY" from anyone who claims to be innocent, and with that in mind, and because I make no claim of innocence, I wish to plead "GUILTY" and respectfully request the Court to accept my plea as follows:

Pursuant to Rule 11(e)(1)(c), Tennessee Rules of Criminal Procedure, Craig Nunn will plead guilty to the following charges in the following counts:

**Guilty to Aggravated Sexual Battery as alleged in Count 1 . . .
with a sentence of 12 years as a Range I offender;**

**Guilty to Aggravated Sexual Battery as alleged in Count 3 . . .
with a sentence of 12 years as a Range I offender;**

**Guilty to Aggravated Sexual Battery as alleged in Count 5 . . .
with a sentence of 12 years as a Range I offender; and**

**Guilty to Aggravated sexual Battery, which is a lesser included
offense to Rape of a Child as alleged in Count 9 . . . with a
sentence of 12 years as a Range I offender.**

**All sentences in Count 1, 3, 5 and 9 to run concurrently. Under the violent
offender statute to be served at 100% w/ minimum release at 85%
[handwritten by the Defendant]. Counts 2, 4, 6, and 8 are to be retired on
the following conditions:**

- (1) That within 120 days Craig Nunn will file with the
Tennessee Department of Health appropriate papers
agreeing to the revocation of his Tennessee medical
license; and**
- (2) That the guilty pleas as to Counts 1, 3, 5, and 9 shall not
be sought by Craig Nunn to be withdrawn or altered in
any way; and**

- (3) That no petition to modify sentence pursuant to Rule 35 (b) Tennessee Rules of Criminal Procedure is filed by Craig Nunn; and**
- (4) That no appeal or challenge to said conviction or sentence is maintained by Craig Nunn.**

The Petitioner asserts that his counsel explained to him that by signing these provisions he was giving up his right to direct appeal and post-conviction appeal. The Petitioner contends that he only recently learned that waiver of his post-conviction rights posed serious ethical concerns, and he quickly filed a petition for post-conviction relief, asking the trial court to toll the statute of limitations based upon due process grounds. In an affidavit attached to the Petitioner's petition for post-conviction relief, the Petitioner swears that:

[His counsel at the guilty plea hearing] told me that I had to waive all appeals and post conviction actions if I wanted to enter into a plea agreement. [Counsel] never discussed any conflict he had in asking me to waive my post conviction rights which included claims that he was ineffective as my attorney. [Counsel] never discussed any conflict that the prosecution had in asking me to waive my post conviction rights which included any claims of prosecutorial misconduct or other constitutional deprivations by the prosecution. [Counsel] did not give me any information about the types of issues I would be able to raise on direct appeal, state post conviction or federal habeas corpus. [Counsel] did tell me that post conviction claims are never successful when a guilty plea is involved.

In its order on the post-conviction petition, the trial court found:

Petitions for post-conviction relief must be filed within one year of the date of final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one year of the date on which the judgment became final, or consideration of such petition shall be barred. T.C.A. 40-30-102(a). Exceptions to this provision are allowed where the claim is based upon a new rule of constitutional law, upon new scientific evidence showing innocence, or upon a sentence that was enhanced because of convictions that have subsequently been found to be illegal. *See* T.C.A. 40-30-102(b)(1), (2) and (3).

The [P]etitioner argues that the statute of limitations should be tolled in this matter based on the fact that counsel advised him that by entering into the plea agreement he was waiving his right to direct appeal, habeas corpus and post-conviction relief. The [P]etitioner cites several ethics opinions in his Petition which condemn the practice of defense attorneys advising their clients to waive post-conviction remedies in plea agreements. While this activity would definitely not be prudent, it does not appear as though the right to file a petition for post-conviction relief was specifically waived in the plea agreement entered into by

the [P]etitioner. It merely states that “no appeal or challenge to said conviction or sentence is maintained by Craig Nunn.”

In his Petition, the [P]etitioner attached several ethics opinions They specifically state that it is not unethical for plea agreements to contain provisions waiving appellate or post-conviction relief as long as they do not restrict claims of ineffective assistance of counsel or prosecutorial misconduct. The plea agreement signed by the [P]etitioner in this matter does not appear to have waived such rights.

Based upon this, the trial court summarily dismissed the petition for post-conviction relief finding that it was time-barred. It is from that order of the court that the Petitioner now appeals.

II. Analysis

On appeal, the Petitioner contends that due process concerns must toll the statute of limitations in this case. The State counters that no exception to the tolling of the statute of limitations applies to the Petitioner’s case.

Tennessee Code Annotated section 40-30-102(a) (2003) provides that a petition for post-conviction relief must be filed within one year from final judgment. The Petitioner filed his petition beyond that time allowed by the statute, and none of the exceptions to this time limit apply in this case. See Tenn. Code Ann. § 40-30-102(b). Under the Post-Conviction Procedure Act, exceptions to the statute of limitations are set forth. These exceptions include: (1) claims based upon a new rule of constitutional law applicable to a petitioner’s case; (2) claims based upon new scientific evidence showing innocence; and (3) claims based upon sentences that were enhanced because of a previous conviction and the previous conviction was subsequently found to be illegal. See Tenn. Code Ann. § 40-30-102(b)(1)-(3) (2003).

A court may also consider an untimely petition for post-conviction relief if applying the statute of limitations would deny the petitioner due process. Burford v. State, 845 S.W.2d 204, 208 (Tenn. 1992) (holding that due process required tolling the statute of limitations where the petitioner’s private interest in the opportunity to attack his conviction and incarceration on the grounds that he was deprived a constitutional right outweighed the State’s interest in preventing the litigation of stale and groundless claims); see, e.g., Williams v. State, 44 S.W.3d 464, 471 (Tenn. 2001) (holding that attorney misrepresentation may toll the post-conviction statute of limitations despite the presence of statutory language stating that the statute of limitations shall not be tolled for any reason); Philip R. Workman v. State, 41 S.W.3d 100 (Tenn. 2001) (holding that the petitioner’s “interest in obtaining a hearing to present newly discovered evidence that may establish actual innocence of a capital offense far outweighs any governmental interest in preventing the litigation of stale claims”); Seals v. State, 23 S.W.3d 272, 279 (Tenn. 2000) (holding that “due process requires tolling of the statute of limitations where a petitioner is denied the reasonable opportunity to assert a claim in a meaningful time and manner due to mental incompetence”).

In Burford, the Tennessee Supreme Court recognized that:

[B]efore a state may terminate a claim for failure to comply with procedural requirements such as statutes of limitations, due process requires that potential litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner.

Burford, 845 S.W.2d at 208. In determining what process is due for post-conviction claims, or in other words, what opportunity must be given, the Court used this balancing analysis—“Identification of the precise dictates of due process requires consideration of both the governmental interests involved and the private interests affected by the official action.” Id. at 207. “The fundamental requirement of due process is the *opportunity* to be heard ‘at a meaningful time and in a meaningful manner.’” House v. State, 911 S.W.2d 705, 711 (Tenn. 1995) (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).

The Tennessee Supreme Court has summarized the basic rule in Burford as:

[I]n certain circumstances, due process prohibits the strict application of the post-conviction statute of limitations to bar a petitioner’s claim when the grounds for relief, whether legal or factual, arise after the “final action of the highest state appellate court to which an appeal is taken” – or, in other words, when the grounds arise after the point at which the limitations period would normally have begun to run.

Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995). In applying the Burford rule to specific factual situations, courts should utilize a three-step process:

(1) determine when the limitations period would normally have begun to run; (2) determine whether the grounds for relief actually arose after the limitations period would normally have commenced; and (3) if the grounds are “later-arising,” determine if, under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim. In making this final determination, courts should carefully weigh the petitioner’s liberty interest in “collaterally attacking constitutional violations occurring during the conviction process,” Burford, 845 S.W.2d at 207, against the State’s interest in preventing the ligation of “stale and fraudulent claims.” Id. at 208.

Sands, 903 S.W.2d at 301.

In the case under submission, the record is not entirely clear when the Petitioner’s limitations period would normally have begun to run, but we assume, from the record, that it began on January 14, 1999, the date that the guilty plea was accepted by the trial court. The limitations period expired well before the Petitioner filed his petition for post-conviction relief

on April 13, 2005. Next, we must determine whether the grounds for relief arose after the limitations period would have normally commenced.

The Petitioner relies upon Williams v. State, for the proposition that an attorney's misrepresentation may require the tolling of the statute of limitations. He asserts that his ground for relief did not arise until he discovered that his trial attorney had misrepresented that the Petitioner could not seek a petition for post-conviction relief. In Williams, the petitioner's conviction and sentence were affirmed by this Court on January 9, 1995. Williams v. State, 44 S.W.3d at 465. In a substantially late-filed motion to withdraw filed by petitioner Williams' counsel, counsel stated that he mailed Williams a copy of the decision and informed Williams that he no longer represented him. Id. Tennessee Supreme Court Rule 14 requires that a motion to withdraw must be filed not more than fourteen days after entry of judgment in the Court of Criminal Appeals. Williams' counsel did not file the motion until October, 1995, nine months after entry of the judgment. Id. Williams filed a pro se petition for post-conviction relief on October 24, 1996, which the post-conviction court dismissed as untimely filed, without conducting an evidentiary hearing. Id. at 466-67. The Supreme Court concluded that "[f]urther development of the record [was] required to determine the precise circumstances surrounding the [petitioner's] understanding of his relationship to counsel." Id. at 471. On remand, the evidentiary hearing was limited to determining:

(1) whether due process tolled the statute of limitations so as to give the [petitioner] a reasonable opportunity after the expiration of the limitations period to present his claim in a meaningful time and manner; and (2) if so, whether the [petitioner's] filing of the post-conviction petition in October 1996 was within the reasonable opportunity afforded by the due process tolling.

Id. When the Court remanded the case, it noted that "the [petitioner] might have been denied the opportunity to challenge his conviction in a timely manner through no fault of his own but because of the possible misrepresentation of his counsel." Id. at 468.

The Williams decision is not intended to require a hearing on due process concerns every time a petitioner alleges that the untimeliness of his petition is due to his trial or appellate counsel's negligence. Bronzo Gosnell v. State, No. E2004-02654-CCA-R3-PC, 2005 WL 1996629, at *4 (Tenn. Crim. App., at Knoxville, Aug. 19 2005), *no Tenn. R. App. P. 11 application filed*. Indeed, "[s]uch a rule is clearly inconsistent with the plain language of the post-conviction statute requiring a trial judge to summarily dismiss an untimely petition without . . . a hearing." Williams, 44 S.W.3d at 476 (Drowta, J., dissenting). To clarify the holding in Williams, the majority specifically stated:

[W]e are not holding that a petitioner may be excused from filing an untimely post-conviction petition as a result of counsel's negligence. Instead, the focus here is only upon trial and appellate counsel's alleged misrepresentation in failing to . . . notify the petitioner that no application for permission to appeal would be filed in [the Tennessee Supreme] Court.

Id. at 468 n.7.

In this case the Petitioner pled guilty, and the Petitioner contends that his trial attorney informed him that, as part of that plea, he could not pursue a petition for post-conviction relief. “[A]lthough, generally, a guilty plea entered on the competent advice of counsel will be held to waive the majority of fundamental protections afforded by the Constitution, a guilty plea cannot waive . . . those constitutional challenges to the resulting conviction if the plea itself was not knowingly and voluntarily entered upon competent advice of counsel.” Alicial Shayne Lovera v. State, No. 03C01-9901-CC-00030, 2000 WL 2646 (Tenn. Crim. App., at Knoxville, Jan. 4, 2000), *no Tenn. R. App. P. 11 application filed*. If, in fact, the Petitioner was told by his trial counsel that the guilty plea included a waiver of the Petitioner’s right to file a petition for post-conviction relief (in which the same counsel’s effectiveness during the guilty plea process would presumably be challenged), then the issue of whether or not the Petitioner’s guilty plea was knowingly entered would be fairly raised, and the post-conviction court should examine whether due process requires tolling the statute of limitations.

The question in this case is, then, whether the Petitioner was, in fact, misled to believe that he could not pursue a post-conviction claim, and the sole inquiry is whether the limitations period is tolled because of due process concerns surrounding possible attorney misrepresentation. Further development of the record is required to determine the precise circumstances surrounding the Petitioner’s guilty plea and his trial counsel’s advice with regard to that guilty plea. Accordingly, we remand this case to the trial court for an evidentiary hearing to determine the circumstances surrounding the guilty plea, the advice given, and whether this precluded the Petitioner from filing a timely petition for post-conviction relief.

III. Conclusion

In accordance with the foregoing reasoning and authorities, we reverse the post-conviction court’s summary dismissal of the Petitioner’s petition for post-conviction relief, and, because the record needs further development for this Court to decide this issue, we remand the case to the trial court for a further evidentiary hearing to determine the circumstances surrounding the Petitioner’s untimely filing of his post-conviction petition.

ROBERT W. WEDEMEYER, JUDGE